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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

* * *

NO. 76-5606

* * *

LOUIS C. ACKER, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

* * *

ON APPEAL FROM THE COUNTY COURT AT LAW

NUMBER TWO, TRAVIS COUNTY, TEXAS

* * *

JURISDICTIONAL STATEMENT

* * *

October 28, 1976

William P. Allison
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The Appellant, Louis C. Acker, appeals from a final judgment of County Court at Law Number Two, Travis County, Texas, Judge Mary Pearl Williams presiding, entered on August 2, 1976, finding him guilty of violating TEX. PENAL CODE ANN. § 42.01(a)(1)(1974) (abusive language/disorderly conduct) and submits this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial federal questions are presented.

OPINION BELOW

There is no formal opinion of the County Court at Law Number Two in this case. Nor is there an oral decision because the case was taken under advisement at the conclusion of the trial. There are, however, two letters from the Court to the attorneys which,

respectively, overrule the Appellant's Motion to Quash and find him guilty of the offense charged. Those letters set forth the Court's reasoning (See Appendix A, pp. 6, 87).

JURISDICTION

This criminal complaint was filed in the Municipal Court for Austin, Travis County, Texas, on July 9, 1975, pursuant to TEX. PENAL CODE ANN. § 42.01(a)(1)(1974) (Appendix A, pp. 1, 2). Appellant appeared pro se. He was found guilty, fined twenty-five dollars and required to pay an additional $2.50 state tax. He then "appealed" to the County Courts for a trial de novo. TEX. CODE CRIM. PROC. ANN. art. 45.10 (1965). A Motion to Quash the Complaint for failure to set forth the specific language charged and raising the unconstitutionality of the statute as applied was filed with the Court and heard on November 18, 1975 (Appendix A, p. 3). That Motion was overruled on November 26, 1975 (Appendix A, p. 6). Trial before the Court was held on April 2, 1976, and the case taken under advisement. Appellant's claim that the state statute as applied to him in this situation is unconstitutional under the first amendment was properly raised on motion for directed verdict. Appellant was found guilty on April 14, 1976. On August 2, 1976, the Court, upon recommendation of the prosecutor, imposed a fine of seventy-five dollars plus an additional forty-nine dollars and fifty cents in court costs. Final judgment was entered that same day (Appendix A, p. 92). The federal questions decided by the trial court were certified by Judge Williams on September 29, 1976 (Appendix A, p. 95). Notice of Appeal to the Supreme Court of the United States was timely filed on October 12, 1976 (Appendix A, p. 96).

No review of the substantial federal questions presented in this case is available within the Texas appellate system because of

the classification of the crime (Class "C" misdemeanor) and the imposition of a fine not in excess of $100. TEX. CODE CRIM. PROC. ANN. art. 4.03 (1965). Therefore, County Court at Law Number Two, even though aware of the substantial nature of the constitutional questions presented, the lack of any interpretation of this statute by the Texas Court of Criminal Appeals and the desire of the Appellant to such review on appeal (as reflected by his request that the Court fine him in excess of one hundred dollars) nevertheless chose to become the highest available court in the state to uphold the applied validity of this criminal statute in the face of challenges that it was repugnant to the United States Constitution.

Under these circumstances, jurisdiction to review the judgment of the County Court in this case is conferred on this Court by 28 U.S.C. § 1257(2). Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921); Cohen v. California, 403 U.S. 15 (1971); Powell v. Texas, 392 U.S. 514 (1968).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The first amendment to the United States Constitution reads, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . ."

The applicable part of the fifth amendment states: "No person . . . shall . . . be subject for the same offense to be twice put in jeopardy of life or limb; . . ."

The relevant portion of the sixth amendment states: "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation; . . ."

The pertinent part of section one of the fourteenth amendment to the Constitution states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

The Texas abusive language statute, TEX. PENAL CODE ANN. § 42.01(a)(1)(1974), appears in Vernon's Texas Statutes Annotated, Penal Code, Vol. 4, p. 124 (1974), and states:

> § 42.01. DISORDERLY CONDUCT
> (a) A person commits an offense if he intentionally or knowingly:
> (1) uses abusive, indecent, profane, or vulgar language in a public place, and the language by its very utterance tends to incite an immediate breach of the peace;

The other frequently used section of the Texas disorderly conduct statute, TEX. PENAL CODE ANN. § 42.01(a)(4)(1974), is also used to criminalize language and gestures. It is found in the same volume and on the same page as the abusive language statute and reads:

> § 42.01. DISORDERLY CONDUCT
> (a) A person commits an offense if he intentionally or knowingly:
> (4) abuses or threatens a person in a public place in an obviously offensive manner;

The jurisdiction of the Texas Court of Criminal Appeals is controlled in pertinent part by TEX. CODE CRIM. PROC. ANN. art. 4.03 (1965) and appears in Vernon's Texas Annotated Statutes, Code of Criminal Procedure, Vol. 1, p. 141 (1965). It states:

> Art. 4.03. COURT OF CRIMINAL APPEALS
> The Court of Criminal Appeals shall have appellate jurisdiction coextensive with the limits of the State in all criminal cases. This Article shall not be so construed as to embrace any case which has been appealed from any inferior court to the county court, the county criminal court, or county court at law, in which the fine imposed by the county court, the county criminal court or the county court at law shall not exceed one hundred dollars.

The initial "appeal" in this case is controlled by TEX. CODE CRIM. PROC. ANN. art. 45.10 (1965) and appears in Vernon's Texas Statutes Annotated, Code of Criminal Procedure, Vol. 5, p. 530 (1965). It reads, in pertinent part:

> Art. 45.10. APPEALS
> Appeals from a corporation court shall be heard by the county court except in cases where the county court has no jurisdiction, in which counties such appeals shall be heard by the proper court. In such appeals the trial shall be de novo. . . .

QUESTIONS PRESENTED

1. Whether the application of the Texas abusive language statute to the Appellant on the facts in this case violated the first amendment's protection of freedom of speech?

2. Whether the failure of a State to set forth on the face of the charging instrument the specific language by which it accuses a defendant of a crime of speech violates the Due Process Clause of the fourteenth amendment to the United States Constitution?

STATEMENT

The alleged offense occurred on July 9, 1965, at approximately 5:15 p.m. at a busy downtown intersection in Austin, Texas. According to the testimony of those present, the driver of the Appellant's automobile pulled up alongside the complaining witness' car which had been involved in a very minor traffic incident and stated, "Get your fucking car out of the way. You're blocking traffic." (Appendix A, pp. 13, 28). This statement may have been repeated. The record is clear that no violence was intended or attempted by either party. The driver of Appellant's car then gave the car's license number to the complaining witness and drove off.

Several weeks later the Appellant received notice that criminal charges had been filed against him, his name apparently having been determined from a license plate check. Appellant testified that it was not until this time that he became aware of the incident because it was his roommate, driving Appellant's car, who had spoken the

words that were the basis of this prosecution (Appendix A, pp. 69, 70). Being without funds to hire a lawyer, the Appellant appeared for trial pro se without his roommate and was found guilty. Municipal courts in Texas are not courts of record, so there is no record of the proceedings in that trial. He "appealed" to the County Court at Law and sought legal assistance through the Criminal Law Clinical Program at The University of Texas School of Law.

In response to the computerized charging instrument cranked out by the municipal authorities, Appellant, now represented by a student attorney under the supervision of a practicing lawyer, filed a Motion to Quash the Complaint for failure to set forth the language which the State alleges was so abusive that, " . . . by its very utterance [it] tended to incite an immediate breach of the peace." The Motion to Quash relied upon the Due Process Clause of the fourteenth amendment. The Motion was taken under advisement and ruled on in a letter to counsel. Judge Williams held the statute constitutional as applied by stating, "[a]n indictment, information, or complaint for using abusive language need not set out the language used." (Appendix A, p. 6).

The trial of this cause was before Judge Williams on April 2, 1976. At the end of the State's case, Appellant moved for a directed verdict and raised the inapplicability of this statute to the Appellant in this case because the language spoken "was simply not criminal." (Appendix A, pp. 35, 36, 38, 40, 41 and 47). The prosecutor clearly articulated the constitutional question by stating to the Court, "The Court here is in a position to where I think it needs to look at the facts and determine whether or not the language used is protected language under the First Amendment." (Appendix A, pp.41, 42). The Motion to Quash was again raised on directed verdict. The ruling on directed verdict was against the Appellant and upheld the validity of the statute as applied to Appellant. The trial court judge

clarified her legal holdings by certifying the nature of the rulings made. This was done with the prior assent of the prosecutor (Appendix A, p. 95).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

> This case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance.

Cohen v. California, 403 U.S. 15, 15 (1971). Mr. Justice Harlan's introductory sentence to this first amendment decision states the substantiality of the federal questions presented in the present case.

This appeal presents constitutional questions which substantially affect every states' court and law enforcement systems. They aim at the very heart of police/community relations and at the soul of the growing disaffection between the citizenry and its system of criminal justice administration.

Every state in the union, in some form or another, seeks to criminalize abusive language (See Appendix B). Most of these statutes, like Texas', provide for relatively minor penalties of fines or fines and jail time. Some of these abusive language situations will arise between private citizens; however, the vast majority are between a private citizen and a law enforcement official. That citizen is quite likely to spend at least one night in jail and feel the immediate impact of an exercise of the state "police power" prior to being released from custody.

In Austin, Texas, in 1975, there were 994 custody arrests made for disorderly conduct. Thirty-five of those arrested were released; the remaining 959 persons were charged. Austin Police Department,

Statistical Report - 1975, at 5.

The Municipal Courts in Austin, Texas, are the most crowded courts in the city. Traffic cases make up the bulk of the caseload. Public intoxication is the second most popular offense charged and abusive language is third. Out of 1712 complaints, including traffic cases, filed in the Municipal Courts for Austin from September 2, through October 6, 1976, eighty-seven were for abusive, indecent, profane or vulgar language. Another forty-three complaints were for being abusive or threatening "in an obviously offensive manner" under TEX. PENAL CODE ANN. § 42.01(a)(4)(1974), a section of that statute which is also used to charge many speech offenses. The other eight sections of the Texas disorderly conduct statute are rarely charged according to the Municipal Court records. Therefore, the 994 arrests for disorderly conduct in Austin in 1975, and the 954 disorderly conduct charges filed by the Austin Police Department were almost all for some type of abusive language.

If this number of arrests and cases is extrapolated across the nation, it can reasonably be deduced that except for traffic offenses and intoxication charges, more people are brought to bar in our lower court systems to answer for "speech" crimes than any other category. If there were a readily available nationwide statistical source, the numbers of such cases would be shocking. Many of the courts in which these cases are tried do not appoint counsel for indigent defendants and, indeed, the judge himself may not be an attorney. All of these factors intersect many times a day throughout the United States to produce a very summary form of criminal justice in these cases. Often lost is the fact that in every abusive language case, unlike traffic and intoxication cases, there is an overriding first amendment question.

The Texas statute is a "second generation" statute drafted to

be facially valid under the Chaplinsky-Gooding line of cases. Louis Acker's case is a classic example of the crying need, at a national level, for guidelines on how to proceed once it is determined that the statute itself is as narrowly drawn as a state can reasonably be expected to produce.

Both of the federal questions presented to the trial court in this case are substantial and call for plenary consideration.

1. The first question presented is whether the language alleged to have been spoken in this case can be prosecuted under the Texas abusive language statute without rendering the statute as applied invalid under the first amendment. It cannot.

This raises questions of law and fact. The Supreme Court will review a state court's findings of fact,

> [w]here a federal right has been denied as a result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary in order to pass upon the Federal question, to analyze the facts.

Fiske v. Kansas, 274 U.S. 380, 385-386 (1927).

The trial court stated, "[t]hese are 'fighting words.'" (Appendix A, p. 87). This decision, essential to the finding of guilt, puts this case squarely in conflict with the prior rulings of this Court on "fighting words." Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Gooding v. Wilson, 405 U.S. 518 (1972). This point was clearly raised by Appellant at the first possible opportunity, at the close of the state's case (Appendix A, pp. 35-48).

It is essential that "fighting words" tend to incite some immediate violence. Justice Murphy stated the doctrine thusly:

> There are certain well-defined and narrowly limited classes of speech, the prevention of which have never been thought to raise any constitutional problem. These include . . . the insulting or "fighting" words--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. (Footnotes omitted)

Chaplinsky v. New Hampshire, supra at 571-72. This two-pronged test, "injury" or sensibilities and "breach of the peace" or violence, persisted until Cohen v. California, 403 U.S. 15 (1971) and Gooding v. Wilson, supra. See Rutzick, Offensive Language and the Evolution of the First Amendment, 9 HARV. CIV. RIGHTS - CIV. LIB. L. REV. 1, 22 (1974).

The Court in Cohen restated the Chaplinsky doctrine without any reference to "sensibilities":

> This Court has also held that the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called "fighting words," those personally abusive epithets which, when addressed to the ordinary citizen, are as a matter of common knowledge inherently likely to provoke violent reaction.

Cohen v. California, supra at 20. The next term, this Court considered and decided Gooding v. Wilson, supra. The Court's decision in Gooding more explicitly rejected the "sensibilities" doctrine by citing three Georgia cases where insulting language had been used. Justice Brennan said,

> Plainly, although "conveying . . . disgrace" or "harsh insulting language," these were not words "which by their very utterance . . . tend to incite an immediate breach of the peace."

Id. at 525. The language of one of the three Georgia cases was specifically pointed out to the trial court in this case for direct comparison (Appendix A, p. 36). This Court in Gooding ruled that the words "God damn you, why don't you get out of the road" were not "fighting words" as a matter of law.

The Texas abusive language statute has specifically rejected the "sensibilities" doctrine by adopting the Chaplinsky "fighting words" language but leaving out the phrase "inflict injury."

There was no evidence in the trial of this case to indicate that there was even the remotest possibility of an immediate breach of the peace. Both parties remained seated behind the wheels of their

respective automobiles during the entire episode (Appendix A, pp. 15, 19). The testimony of the complaining witness was that the words only "upset" her and that there was no "violence." (Appendix A, pp. 17, 22, 80). The only other state's witness (to whom the language was not addressed) was merely "bothered" by the episode (Appendix A, p. 32). Mr. Daniel, the Appellant's roommate who while testifying under oath confessed to being the person involved in the incident, stated that he never intended to do her harm (Appendix A, pp. 53-54). And all the testimony indicated that the speaker, when requested by the complaining witness to state his license plate number and leave, did exactly as requested (Appendix A, pp. 17, 18, 20, 27, 28 52 and 53). In fact, the complaining witness affirmed that the entire incident was conducted in a "very civil manner" (Appendix A, p. 80).

The trial court judge did what many trial court judges do daily when faced with similar abusive language cases, she applied a "sensibilities" doctrine. This Court has not made clear to the lower courts of the nation that the "sensibilities" doctrine is no longer included in "fighting words". It has ruled by omission. Cohen v. California, supra; Gooding v. Wilson, supra; Rosenfeld v. New Jersey, 408 U.S. 901 (1972); Brown v. Oklahoma, 408 U.S. 914; Cason v. City of Columbus, 409 U.S. 1053 (1972); Papish v. Board of Curators, 410 U.S. 667 (1973); reh. den. 411 U.S. 960 (1973); Hess v. Indiana, 414 U.S. 105 (1973); Lucas v. Arkansas, rev'd and remanded, 416 U.S. 919 (1974), appeal dismissed 96 S.Ct. 17 (1975).

It is clear that a state is not free to criminalize particular words, specifically, the word "fuck". Cohen v. California, supra at 26 (1971). At the same time, the Court recognized that language has a dual communicative function--emotive and cognitive. Id. at 25-26. The word "fucking" in this case was plainly "emotive", to emphasize

the legitimate request being made. Clearly, without that word, no one could begin to think it reasonable that a request to move one's car from partially blocking traffic could be sanctioned as "fighting words."

This Court should call for briefs and oral argument in this case in order to build an analytical model for application to abusive language situations. The impact of arguably valid statutes being applied on the streets and in our courts in an obviously overbroad manner can only serve to increase daily the strain on already overburdened police/community relations. It is exactly this type of citizen disaffection in one sensitive area that breeds a general disgust and lack of faith in the criminal justice system.

2. The Appellant in this case has been charged under the Texas abusive language statute by a fundamentally defective charging instrument. The Complaint charged, in pertinent part,

> [that the appellant] on or about the 9th day of July, 1975, . . . did, in a public place, to-wit: intersection of W. 1st St. and Congress Ave. knowingly use (abusive) (XXXXXXXXXXXXXXXXXXXXXXXX) language, which said language by its very utterance tended to incite an immediate breach of the peace.

(Appendix A, p. 1). Appellant timely complained of the unconstitutional application of this statute by Motion to Quash, raising fifth, sixth and fourteenth amendment protections. After a hearing on the Motion, the Court stated, "Defendant's Motion to Quash is denied. An indictment, information, or complaint for using abusive language need not set out the language used." (Appendix A, p. 6). The trial court was fundamentally wrong. Although this Court has never so ruled, the Constitution requires that in this type of proceeding the specific language used must be set forth on the face of the charging instrument in order to allow the accused a reasonable opportunity to defend

and to plead the case in bar of subsequent prosecution for the same offense. cf. Cochran and Sayre v. United States, 157 U.S. 286 (1895); Russell v. United States, 369 U.S. 749, 761, 764 (1962).

This Court has given adequate guidelines for the facial constitutionality of abusive language statutes. It should now turn its attention to constructing an analytical model to assist the lower courts in their efforts to apply these statutes in a constitutional manner. Since each of these thousands of cases must be initiated by some charging instrument, that is a logical starting point. This appeal, considered in light of this particular question, goes far beyond the abusive language field. It includes rudimentary constitutional doctrines which should apply to all alleged crimes of spoken, as opposed to written, language.

Several state courts have ruled on the sufficiency of charging instruments under abusive language statutes; Spears v. Mississippi, 253 Miss. 108, 175 So.2d 158 (1965); Maine v. Good, 308 A.2d 576 (Me. 1973). In both of these cases, like the present appeal, a crime of pure speech was charged in conclusory terms and in each the Court found the charging instrument inadequate. The Mississippi Supreme Court in Spears decided the case clearly on constitutional grounds. The Supreme Judicial Court of Maine preferred grounds that are similar to grounds under the sixth amendment. The Court also stated:

> When the particular language used is not specified neither the Defendant nor the Court knows whether the Defendant is charged with asserting points of view, however annoying to the listeners, which are protected speech under the First Amendment of the United States Constitution. . . .

Maine v. Good, supra at 579. This very point was raised by Appellant in his Motion to Quash and again on Motion for Directed Verdict after the state had presented its case (Appendix A, pp. 38, 39).

Texas' cases under the predecessor statute are squarely against Appellant. Foreman v. State, 31 Tex. Crim. 477, 20 S.W. 1109 (1893);

Green v. State, 116 Tex. Crim. 2, 32 S.W.2d 650 (1930). Other jurisdictions have also held contrary to Appellant's position in prosecutions for similar offenses. New Hampshire v. O'Neill, 105 N.H. 15, 191 A.2d 528 (1963); Louisiana v.Lewis , 253 La. 230, 217 So.2d 381 (1968).

In another "speech" area, this Court has had an opportunity to deal with the specificity of charging instruments. In Rosen v. United States, 161 U.S. 29 (1896), the defendant was charged with mailing an obscene paper, which the indictment described in some detail. Mr. Justice Harlan stated the Constitutional rule:

> A defendant is informed of the nature and cause of the accusation against him if the indictment contains such description of the offense charged as will enable him to make his defence and to plead the judgment in bar of any further prosecution for the same crime.

Id. at 34. The Court decided the indictment was sufficient because the document was described and was available to the defendant by bill of particulars.

This Court has also had opportunity to pass upon the sufficiency of charging instruments in federal prosecutions for perjury. The case of United States v. Debrow, 346 U.S. 374 (1953), raised such questions. A cursory reading of this Court's opinion in Debrow might lead one to believe that in perjury cases the language used need not be charged. (The actual charging question, decided adversely to the Appellant, was whether the name of the officer administering the oath should be particularized.) However, the indictment on which Mr. Debrow was tried is set forth in the Fifth Circuit opinion and the specific questions and answers are charged in haec verba. United States v. Debrow, 203 F.2d 699, 702-703 n. 1 (5th Cir. 1953)(Rives, J., dissenting). Accord, People v. Aud, 52 Ill.2d 368, 288 N.E.2d 453 (1972).

There are no Supreme Court decisions on the sufficiency of

charging instruments with respect to the language used in prosecutions for libel and slander. However, the annotation in Corpus Juris Secundum indicates that the majority of jurisdictions require the alleged criminal language to be set forth. 53 C.J.S. Libel and Slander, § 296b (1948).

Recently, this Court decided a case which clearly raised constitutional questions of the sufficiency of the charging instruments. Russell v. United States, 369 U.S. 749 (1962). These were federal prosecutions for failure to answer certain questions before a Subcommittee of Congress. Although the questions and refusals were set forth in the indictment, the subject matter which the subcommittee had under investigation was not. Since the substantive criminal law under which the government was proceeding required that the questions asked and not answered be "pertinent" to the Congressional inquiry, the Court found the indictments insufficient. Mr. Justice Stewart, speaking for the majority in Russell stated:

> . . . [T]he very core of criminality under 2 U.S.C. section 192, 2 U.S.C.A. section 192 is pertinency to the subject under inquiry of the question which the defendant refused to answer. . . . Where guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than merely repeat the language of the criminal statute.

Id. at 764.

That the specific language in an abusive language case, or in any "pure speech" crime, is pertinent, is axiomatic. How else can one determine whether the language could be "fighting words?" Justice Stewart illustrated the insufficiency of the indictment in Russell by borrowing a line of analysis from United States v. Cruickshank, 92 U.S. 542 (1875). The charging instrument must be sufficient enough "to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction if one should be had." Id. at 558. This was exactly the purpose

of the Motion to Quash in the present case. It was designed to require the government to particularize its charge so as to enable the trial court to determine whether Appellant could constitutionally be tried for the words he allegedly spoke (Appendix A, p. 39).

The charging instrument in this case also fails fundamentally because the Appellant could not plead it in bar of a second prosecution for the same offense. E.g., Russell v. United States, supra at 764. The time period of the complaint is twenty-four hours. The place is an intersection and the words are not memorialized. Since most people use language for the better part of the day, it would not be unusual for a person to have used language at a particular intersection on several different occasions during the day. It is not a far-fetched example to imagine the rough-talking person whose job kept him or her at a particular intersection during an entire working day being charged with numerous complaints for abusive language, each one identical to the last.

Crimes of "speech" can as easily be classified as crimes of "hearing". For purposes of testing the sufficiency of the charging instrument, the latter description is more relevant. The Defendant may or may not know what he or she said. Even if the Defendant knows the language "spoken", it will be of little help in building a meaningful defense if the language "heard" is of a different nature. This is particularly true in abusive language cases in which the emotions of the moment are likely to distort the participants' perception of what occurred. The Court should adopt the Constitutional rule urged by Appellant that whenever the government charges a crime of "speech", it must set forth the particular language on the face of the charging instrument.

CONCLUSION

For the foregoing reasons, the questions presented by this appeal are substantial and are of great public importance. It is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

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ON APPEAL FROM THE COUNTY COURT AT LAW

NUMBER TWO, TRAVIS COUNTY, TEXAS

* * *

APPELLEE'S MOTION TO DISMISS OR AFFIRM

* * *

March 11, 1977

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Travis County Courthouse
Austin, Texas 78701

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

* * *

LOUIS C. ACKER, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

* * *

ON APPEAL FROM THE COUNTY COURT AT LAW

NUMBER TWO, TRAVIS COUNTY, TEXAS

* * *

APPELLEE'S MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, respectfully moves this Honorable Court to dismiss the above entitled appeal, or in the alternative to affirm the judgment of the County Court on the ground that there is no jurisdiction.

I.

Appellant, Louis C. Acker, has claimed that jurisdiction in the United States Supreme Court exists by virture of 28 U.S.C. § 1257(2). The Appellee, the State of Texas, respectfully suggests that jurisdiction cannot lie in the United States Supreme Court by virtue of 28 U.S.C. § 1257(2).

The first sentence of 28 U.S.C. § 1257(2) provides that, "Final judgments or decrees rendered by the highest court of a

state in which a decision could be had,...". One of the cases cited by Appellant states that as a requirement for such jurisdiction, the decision must be by the highest state court in which review may be had. Cohen v California, 403 U.S. 15 (1971) This requirement has not been met.

Appellant has an available method by which the issues presented to the United States Supreme Court in Appellant's brief may be submitted for review by higher state courts. Appellant may attack the constitutionality of laws following conviction by filing a Writ of Habeas Corpus in the Texas courts.

In Ex Parte Wilbur, 155 TEX. CRIM. 21, 230 S.W.2d 540 (1950) petitioner had been convicted of violation of a city ordinance. The statute involved in the instant case and an ordinance are similar in that original jurisdiction is in a Justice of the Peace Court with an appeal by trial de novo to the County Court. Petitioner Wilbur was fined $25.00 (twenty-five dollars) in the County Court. Petitioner filed a Writ of Habeas Corpus in the District Court wherein relief was denied. Petitioner appealed to the Court of Criminal Appeals wherein relief was granted. Petitioner claimed the ordinance was invalid as an illegal restraint of liberty. The Court of Criminal Appeals found that the ordinance was void.

In Ex Parte Mittelstaedt, 164 TEX. CRIM. 115, 297 S.W.2d 153 (1957), Petitioner followed an identical route to the Court of Criminal Appeals to obtain relief. Petitioner was convicted of loitering within 250 feet of a school under a city ordinance. The Court of Criminal Appeals specifically said that jurisdiction in the Court of Criminal Appeals lies to determine whether an ordinance is void through a Writ of Habeas Corpus. If the statute involved in the case at bar is unconstitutional under the First Amendment of the United States Constitution, it would be a void law. It should

be noticed that both of the above cited cases involved restraints upon personal liberty, though not for free speech, similar to the claims made by Appellant in the case at bar. Copies of these two cases are included in the appendix to this motion.

At the time the decisions were rendered in both of the above cited cases, direct appeals from the County Court to the Court of Criminal Appeals required a fine of at least $100.00 (one hundred dollars). Commentary TEX. CODE CRIM. PROC. ANN. § 4.03 (1966) That is the present rule which controls direct appeal in the case at bar.

II.

This Court should decline to rule because of Appellant's failure to seek review in the higher courts of Texas. On page 3 of his Jurisdictional Statement, Appellant states that the County Court:

> "even though aware of the substantial nature of the constitutional questions presented, the lack of any interpretation of this statute by the Texas Court of Criminal Appeals and the desire of the Appellant to such review on appeal (as reflected by his request that the Court fine him in excess of one hundred dollars) nevertheless chose to become the highest available court in the state to uphold the applied validity of this criminal statute in the face of challenges that it was repugnant to the United States Constitution."

Appellee suggests that the record does not reveal a request by Appellant to be sentenced in excess of $100.00 (one hundred dollars). The transcript of the proceeding on August 2, 1976 reveals that Appellee recommended a fine of $75.00 (seventy-five dollars). Appellant at that time did not make an objection nor did he request a fine in excess of $100.00 (one hundred dollars). The Court accordingly assessed a punishment of a fine of $75.00 (seventy-five dollars). The transcript of the sentencing is included in the appendix.

In addition, a letter from the trial judge to attorneys for both Appellant and Appellee indicates that the trial judge herself offered to sentence Appellant in excess of $100.00 (one hundred dollars) to allow an appeal to Texas' highest court. The trial judge recognized the need for the State's highest court to interpret the statute in question. In her letter the trial judge stated that she would be willing to sentence in excess of the minimum amount required for appeal

> "so that if defendant is planning to raise constitutional issues, appeal can lie to the Court of Criminal Appeals to enable it to make an authoritative interpretation of the statute and also pass upon its constitutionality as interpreted." The letter is included in the appendix.

Appellant, therefore, failed to seek an appeal to the highest court in Texas. Appellant should not be allowed to come to this Court to seek review of a statute which properly could have been reviewed in the Texas Court of Criminal Appeals.

III.

The Supreme Court should decline to hear this case even if the Court determines that it has jurisdiction. In Gooding v Wilson, 405 U.S. 518 (1972) the Court said that it lacked jurisdiction to authoritatively construe state legislation. That case established the rule that the state statutes should first be construed by the state courts before the United States Supreme Court will rule on the constitutionality of the statute. This rule was followed in Rosenfield v New Jersey, 408 U.S. 901 (1972) and in Lewis v City of New Orleans, 415 U.S. 130 (1974).

This is a particularly appropriate case in which to apply that rule. The questions certified by Appellant establish that a ruling by this Court would have the very narrow application to only himself or any person who used identical language. Appellant in his Jurisdictional Statement at page 12 suggests that the Court

should call for briefs and oral argument in order to build an analytical model for application of abusive language statutes. The issues actually before the Court would not allow this case to be used to develop such a model. Even if that were true, the states should be given an opportunity to develop a model.

CONCLUSION

For the foregoing reasons the Court should grant Appellant's motion to dismiss this appeal, or in the alternative, to affirm the judgment entered by the County Court.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

* * *

NO. 76-5606

* * *

LOUIS C. ACKER, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

* * *

ON APPEAL FROM THE COUNTY COURT AT LAW
NUMBER TWO, TRAVIS COUNTY, TEXAS

* * *

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S
MOTION TO DISMISS OR AFFIRM

* * *

March 30 , 1977

WILLIAM P. ALLISON
2500 Red River
Austin, Texas 78705

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

* * *

LOUIS C. ACKER, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

* * *

ON APPEAL FROM THE COUNTY COURT AT LAW
NUMBER TWO, TRAVIS COUNTY, TEXAS

* * *

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S
MOTION TO DISMISS OR AFFIRM

* * *

Appellant submits this brief in opposition to Appellee's Motion to Dismiss or Affirm, pursuant to Rule 16(4) of the Revised Rules of the Supreme Court of the United States, in order to respond to Appellee's contentions that review of this case is available in the Texas Court of Criminal Appeals.

I.

Appellee relies upon cases in which the Texas Court of Criminal Appeals heard habeas corpus petitions challenging the constitutionality of ordinances on their face. Ex Parte Wilbur, 155 Tex. Crim. 21, 230 S.W.2d 540 (1950); Ex Parte Mittelstaedt, 164 Tex. Crim. 115, 297 S.W.2d 153 (1957). The sole question before this Court in the instant case is whether the Texas abusive language statute is unconsti-

tutional as applied to a situation like Appellant's.

This question was specifically ruled upon by this Court in Largent v. Texas, 318 U.S. 418 (1943), in conjunction with the Texas Court of Criminal Appeals decision in Ex Parte Largent, 162 S.W.2d 419 (Tex. Crim. App. 1942). These opinions clearly hold that Appellant, "...under Texas practice, apparently could test by habeas corpus the constitutionality on its face of the ordinance under which [he] was convicted but may not use that writ to test the constitutionality of the ordinance as applied...". Largent v. Texas, supra, at 421. Appellant has found no indication of any change in the law or policy since these decisions.

II.

Appellee contends that the letter from the trial judge constitutes a potential route for appeal to the Texas Court of Criminal Appeals. There is no authority in Texas case law or statute for a judge's re-sentencing Appellant three months after the original final judgment. Even if the judge were to so modify the sentence the Court of Criminal Appeals would have no authority to hear the case months past the actual date of sentencing on August 2, 1976.

III.

Appellant urges that his Jurisdictional Statement illustrates the substantial nature of the questions presented to this Court and the need for this Court's authoritative review of those questions. The very fact that defendants in most of these abusive language cases are likely to be fined in an amount less than the minimum required for review by the states' highest appellate courts makes the statute the sort that may never receive authoritative state court interpretation.

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CONCLUSION

For the foregoing stated reasons, Appellant respectfully requests that this Honorable Court deny Appellee's Motion to Dismiss or Affirm.

Respectfully submitted,

SARA M. SIMPSON
Student Attorney

WILLIAM P. ALLISON
Attorney for Appellant

* * *